Pentadbir Tanah Daerah Petaling v Swee Lin Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO B–01–147 OF 1996
GOPAL SRI RAM, SITI NORMA YAAKOB AND DENIS ONG JJCA
12 JANUARY 1999

***Land Law** — Acquisition of land — Compensation — Amount of — Agricultural land — Whether compensation should be given for a building constructed in absence of planning permission*

The respondent was the registered proprietor of a piece of agricultural land ('the subject property'). The respondent had in 1981 applied for planning permission to construct a warehouse on the subject property but never received any response from the authorities. In 1985, the subject property was acquired by the respondent. In the assesment of compensation, there arose some argument about whether the respondent ought to be compensated for the loss of a warehouse which had been constructed on the subject property despite the absence of any planning permission. The appellant contended that no account should be taken of the warehouse and that no compensation should be given in respect of it but the judge in the court below made an award for the warehouse. The appellant appealed.

Held:

The respondent ought not to have any compensation for the building. The construction of the warehouse on the subject property, in the admitted absence of planning permission, amounts to an unlawful act and therefore comes within the purview of para 1(3)(b) of the First Schedule to the Land Acquisition Act 1960. Paragraph 1(3)(b) when properly interpreted excludes from consideration a building built unlawfully upon land that is being acquired (see p 492F–G).

[Bahasa Malaysia summary

Responden adalah pemilik berdaftar sebidang tanah pertanian ('harta subjek tersebut'). Responden telah pada 1981 memohon untuk kebenaran perancangan untuk membina gudang di atas harta subjek tersebut tetapi tidak menerima sebarang balasan daripada pihak berkuasa. Pada tahun 1985, perkara subjek telah diambil oleh responden. Di dalam penaksiran pampasan, timbul hujahan mengenai sama ada responden patut dipampaskan untuk kehilangan gudang yang telah dibina di atas subjek perkara walaupun dengan ketiadaan kebenaran perancangan. Perayu telah menegaskan bahawa tiada pertimbangan sepatutnya diberikan terhadap gudang tersebut dan bahawa tiada pampasan sepatutnya diberikan berkenaannya tetapi mahkamah bawahan telah memberikan award untuk gudang tersebut. Perayu telah merayu.

Diputuskan:

Responden tidak patut dipampaskan untuk bangunan tersebut. Pembinaan gudang tersebut di atas harta subjek, di dalam ketiadaan kebenaran perancangan, terjumlah kepada tindakan yang menyalahi undang-undang dan oleh itu termasuk dalam ruang lingkup para 1(3)(b) Jadual Pertama kepada Akta Pengambilan Tanah 1960. Perenggan 1(3)(b) apabila ditafsirkan dengan wajar akan mengecualikan pertimbangan sebuah bangunan yang dibina secara menyalahi undang-undang di atas tanah yang diambil (lihat ms 492F–G).]

Notes

For cases on compensation, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 1355–1372.

Cases referred to

Alghussein Establishment v Eton College [1988]1 WLR 587 (refd)
New Zeland Shipping Con Ltd v Societe Des Ateliers Et Chantiers De France [1919] AC 1 (refd)
Singma Sawmill Co Sdn Bhd v Asian Holdings (Industrialised Building) Sdn Bhd [1980] 1 MLJ 21 (refd)

Legislation referred to

Land Acquisition Act 1960 ss 12, 20, 21, First Schedule para 1(3)(b), Form K
National Land Code 1965 ss 53(2), 115(1), (4), 125, 127

Appeal from: Civil Suit No 15–44 of 1990 (High Court, Shah Alam)

Ahmadi bin Haji Asnawi (State Legal Adviser) for the appellant.
B Thangaraj (*Thangaraj & Associates*) for the respondent.

Gopal Sri Ram JCA (delivering oral judgment): The appellant who is the Land Administrator, District of Petaling, being dissatisfied with the award of compensation made by the learned judge in the court below in respect of a building — a warehouse situated on the respondent's land acquired by the appellant, has appealed to us.

The facts of the case have been adequately dealt with by the learned judge in his judgment. There is no need to repeat them at length here. Briefly, the respondent was, until the acquisition declaration, the registered proprietor of a piece of land in the District of Petaling ('the subject property'). The subject property was under mukim title. It is on level ground. The express condition of use was for agriculture only. The respondent, on 18 December 1981, applied for planning permission to construct a warehouse on the subject property. However, until the date of acquisition of the subject property in March 1985 there was no response

A from those entrusted by law to consider and deal with applications for planning permission. The learned legal advisor of Selangor concedes that he is unaware of the reasons for the absence of such response. I may add for completeness that Form K under the Land Acquisition Act 1960 ('the Act') was issued by appellant on 22 January 1987.

B When the judge came to assess the compensation there was some argument about whether the respondent ought to be compensated for loss of the warehouse as well. It was argued by the appellant in the court below that no account should be taken of the warehouse and that no compensation should be given in respect of it. For the respondent it was contended that compensation ought to be awarded even though it was a warehouse that had C been built on agricultural land.

The learned judge agreed with respondent's submission. He then made an award of RM440,000 for the warehouse. The learned judge also confirmed the award of RM260,000 earlier made by appellant. Against this latter order there is no appeal.

D The learned legal advisor argued before us that the learned judge was wrong in making an award for the warehouse by relying on ss 20 and 21 of the Act. These sections provide as follows:

> 20 Where on any scheduled land in respect of which a Certificate of Urgency has been issued there is any building the Land Administrator shall, upon taking formal possession as provided in section 22 of the land not built E upon, serve notices in Form J upon —
>
> (a) the occupier of the building requiring that he vacate the building within such period, not exceeding sixty days from the date of the notice, as may be specified therein;
>
> (b) the owner of the building making an offer of compensation in respect F of the building —
>
> (i) where the building is a permanent structure, of the value of the building as it stands;
>
> (ii) where the building is of temporary construction, or is otherwise capable of removal and re-erection, of the value of the building or the cost of its removal and re-erection.
>
> G 21 (1) Where the owner of a building accepts an offer of compensation under section 20 the Land Administrator —
>
> (a) may take possession of such building on the expiration of the period prescribed in the notice in Form J; or
>
> (b) may, upon its removal by the proprietor, pay the cost of its H removal and re-erection.
>
> (2) Where the owner of a building does not accept an offer of compensation under section 20 the Land Administrator-
>
> (a) where the building is a permanent structure, shall not take possession thereof until he has obtained a valuation of such building by a competent valuer; or
>
> I (b) where the building is of temporary construction, or is otherwise capable of removal and re-erection, may himself remove and re-erect such building.

The learned legal advisor submitted that these two sections have relevance to the issues raised because there was an absence of Certificate of Urgency of which ss 20 and 21 speak of. I think the learned legal advisor is correct in this argument. I agree with his submission that assessment should be directed with s 12 of the Act alone in mind. Section 12 provides:

> (1) On the date appointed under section 10(1) the Land Administrator shall make full enquiry into the value of all scheduled lands and shall as soon as possible thereafter assess the amount of compensation which in his opinion is appropriate in each case, according to the consideration set out in the First Schedule.
>
> (2) The Land Administrator shall also enquire into the respective interests of all persons claiming compensation or who in his opinion are entitled to compensation in respect of the scheduled land, and into the objections, if any, made by any interested person to the area of any scheduled land.
>
> (3) The Land Administrator may for a sufficient cause to be recorded by him in writing postpone any enquiry or adjourn any hearing of an enquiry from time to time.

Our attention has been drawn by the learned legal advisor to the matters that ought to be taken into account by a court when deciding the quantum under the Act. He has referred us to para 1(3)(b) of the First Schedule which reads as follows:

> If the market value of any scheduled land has been increased, or is currently increased, in either of the following ways, such increase shall be disregarded:
>
> (a) ...
>
> (b) an increase by reason of the use of the land, or of any premises thereon, in a manner which could be restrained by any court, or is contrary to law, or is detrimental to the health of the inmates of the premises or to the public health.

Encik Ahmadi, the learned legal advisor, had argued that the warehouse, in the admitted absence of planning permission, was illegally located on the subject property. The respondent, he argues, ought not to benefit from his own wrong. He has further submitted that para 1(3)(b) of the First Schedule when properly interpreted excludes from consideration a building built unlawfully upon land that is being acquired. I am in full agreement with his submission.

Quite apart from the construction of para 1(3)(b) of the First Schedule, there is a principle of great antiquity that a litigant ought not to benefit from its own wrong. Although of universal application, it has been restated when applied to a particular context. For example, the principle when applied in the context of the law of contract may be formulated as follows: a party ought not to be permitted to take advantage if his own breach. See *Alghussein Establishment v Eton College* [1988] 1 WLR 587; *New Zealand Shipping Co Ltd v Societe Des Ateliers Et Chantiers De France* [1919] AC 1.

But as I have said, the principle is of universal application. In the context of the present case, that principle produces the following result. A land owner who has erected a building on his land contrary to law ought not to receive any benefit from it from an acquiring authority under the Act.

Mr Thangaraj, counsel for the respondent, seeks to repel these arguments by contending that the Act is a special law and that breach of any other law ought not to be considered relevant. These arguments are addressed specifically in response to Encik Ahmadi's reliance on certain provisions of the National Land Code 1965 ('the Code'). These are ss 53(2), 115(1) and (4), 125 and 127 of the Code which read as follows:

> 53 (2) All land to which this section applies which is at the commencement of this Act —
>
> (a) country land, or
>
> (b) town or village land held under land office title, shall become subject at that commencement to an implied condition that it shall be used for agricultural purposes only:
>
> Provided that this condition —
>
> (i) shall not prevent —
>
> (a) the use of any part of the land for any purpose for which it could (under section 115) be lawfully used if it were subject instead to the category 'agriculture', or
>
> (b) the continued use of any part thereof for any industrial purpose for which it was lawfully used immediately before the commencement of this Act; and
>
> (ii) shall not apply to any part of the land which is occupied by or in conjunction with —
>
> (a) any building lawfully erected before that commencement, or
>
> (b) any building erected after that commencement, the erection of which would (under section 115) be lawful if the land were subject instead to the category 'agriculture'.
>
> 115 (1) Where any alienated land is subject by virtue of any provision of this Act to the category 'agriculture', the following implied conditions shall, subject to subsection (3), apply thereto —
>
> (a) that no building shall be erected on the land other than a building or buildings to be used for one or more of the purposes specified or referred to in subsection (4);
>
> (b) that a bona fide commencement of cultivation of the land shall be made within twelve months of the relevant date;
>
> (c) that the whole area of the land, other than any part thereof—
>
> (i) occupied by or in conjunction with a building (whenever erected) used for one or more of the purposes specified or referred to in subsection (4), or
>
> (ii) used for any of the purposes mentioned in paragraph (e) of that subsection, or any other purpose which the State Authority may specially authorize,
>
> shall be brought fully under cultivation within three years of the relevant date;
>
> (d) that the area referred to in paragraph (c) shall be maintained and cultivated according to the rules of good husbandry; and
>
> (e) that the said area shall be continuously cultivated:

Provided that the condition specified in paragraph (e) shall be regarded as complied within the case of any area so long as any period during which less than the whole thereof is cultivated does not exceed 12 months.

(2) ...

(3) ...

(4) The purposes referred to in paragraph (a) of subsection(1) are the following —

(a) the purposes of a dwelling-house for the proprietor of the land or any other person lawfully in occupation thereof, or for the servants thereof, or any persons employed for agricultural purposes by, the proprietor or any other such person:

Provided that the dwelling-house for the proprietor of the land or any other person lawfully in occupation thereof shall not occupy more than one-fifth of the whole area of the land or two hectares, whichever is the lesser;

(b) the purposes of agriculture;

(c) the purpose of extracting or processing raw material from any agricultural produce of such land;

(d) the purpose of preparing for distribution any such material or produce, or any honey-bees, livestock or reptiles kept or bred on such land, or the produce of such livestock, or aquaculture on such land;

(e) the purposes of providing educational, medical, sanitary or other welfare facilities, including (so far as they are provided primarily for use by persons employed on the land) facilities for the purchase of goods and other commodities;

(f) any purposes which the State Authority may prescribe for the purposes of this section by rules under section 14;

(g) any purpose which the State Authority may think fit to authorize in the circumstances of any particular case;

(h) any purpose incidental to a purpose falling within any of the preceding paragraphs.

125 (1) A breach of a condition requiring continuous performance shall arise so soon, and continue so long, as the condition is not complied with.

(2) A breach of a condition subject to a fixed term shall arise —

(a) in the case of a condition requiring the doing of any act within any time (being the time specified therein, or that time as extended under section 107) upon the expiry of that time without the act having been done;

(b) in the case of a condition requiring any act to be refrained from until any time, upon the doing of that act before that time.

127 (1) Upon any breach of any condition to which any alienated land is for the time being subject —

(a) the land shall become liable to forfeiture to the State Authority, and

(b) except in a case where a fine is imposed under subsection(1A), or where action for the purpose of causing the breach to be remedied is first required to be taken under section 128, the

A Land Administrator shall proceed with the enforcement of the forfeiture in accordance with the provisions of section 129.

I must express my disagreement with the submission of Mr Thangaraj. In *Singma Sawmill Co Sdn Bhd v Asian Holdings (Industrialised Building) Sdn Bhd* [1980] 1 MLJ 21, the Federal Court held that a tenancy granted in
B contravention of the conditions imposed on the use of the land was illegal because it contravened s 125 of the Code. Raja Azlan Shah acting CJ Malaya, when delivering the judgment of the court said (at pp 25–26):

> In the present case, the breach of the express condition is wilful, if not, contumacious. There is a clear intention on the part of the appellants to use the subject-matter of the agreement ie the land on which the factory was
C created, for an unlawful purpose. The object of the express condition is that the land must be cultivated with rubber and pineapple; the category of the land use us agricultural, and any unilateral conversion to industry is not permitted. Indeed neither party had power to waive the express condition which inextricably runs with the land. If that is permitted it would be entirely to ignore the object of the express condition which is for the public good and
D to defeat the law relating to land use. The appellants are deemed to have been aware of the illegality of the agreement when they entered it and therefore s 66 of the Contracts Act cannot assist them.

On an application of the proposition set out in *Singma Sawmill Co Sdn Bhd v Asian Holdings (Industrialised Buildings) Sdn Bhd*, I am satisfied that the
E construction of the warehouse on the subject property in the present case certainly amounts to an unlawful act. It therefore comes within the purview of para 1(3)(b) of the First Schedule to the Act. In my judgment, the respondent ought not therefore to have any compensation for the building.

The learned judge was, in my opinion, clearly wrong in directing his mind solely to ss 20 and 21 of the Act. Although grant or refusal of
F compensation is usually a discretionary exercise, in this case, there has been a serious breach of principle warranting intervention by this court.

For the reasons already given, I would allow this appeal.

That now brings me to the cross appeal. Encik Thangaraj told this Court that arguments on the cross appeal are limited only to the learned
G judge's refusal to allow interest. It is well settled that the power to award or refuse interest is one of pure discretion. I am in agreement with the submission of En Ahmadi that this is not an appropriate case for appellate intervention. I would, therefore, dismiss the cross appeal.

Siti Norma Yaakob JCA: I agree with the judgment of the learned
H chairman.

Denis Ong JCA: I concur with the judgment delivered by the learned chairman.

Court: We will now hear argument on costs.

I **Ahmadi**: I leave the question on costs to the court.

Thangaraj: I submit that there ought to be no order as to costs on the appeal and cross appeal.

Order

The appeal is allowed. There shall be no order as to the costs of the appeal. The order of the judge awarding RM440,000 as compensation for the warehouse is set aside. The cross appeal is dismissed. No order as to costs in this court. The order as to costs in the court below is to remain.

Order accordingly.

Reported by Joel Ng